

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



**76-1596**

*To be argued by*  
JAMES M. LA ROSSA

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IN THE  
**United States Court of Appeals**  
For the Second Circuit

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No. 76-1596

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee*  
*against*

ANDREW GARGUILO,  
*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

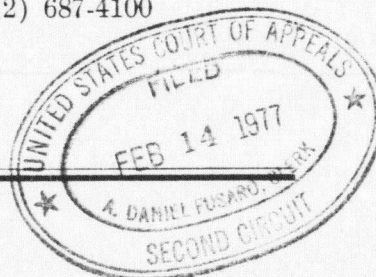
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**BRIEF ON BEHALF OF DEFENDANT-APPELLANT**

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 76 - 1596

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UNITED STATES OF AMERICA,

Appellee,

-against-

ANDREW GARGUILO,

Appellant.

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BRIEF FOR THE APPELLANT  
ANDREW GARGUILO

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Statement of the Case

This is an appeal from a judgment of conviction entered in the United States District Court for the Eastern District of New York on December 10, 1976, after a jury trial (Hon. George Pratt, U.S.D.J.), convicting appellant of two counts of willful failure to file income tax (26 U.S.C. Section 7203) and sentencing him to six months in prison (followed by three years probation) and a five thousand dollar fine.

Appellant has been continued on bail pending this appeal.

Summary of Argument

Indictment 75 CR 736 charged appellant and his brother Anthony with various income tax violations based on an alleged failure to report income from their asserted operation of a gambling enter-

prise. Count 1 charged them with conspiracy to violate the income tax laws; Counts 2-4 charged Anthony with filing false income tax returns in 1970-1972; Counts 5-7 charged Andrew with failure to file in 1969, 1970 and 1972; and Count 8 charged Andrew with false filing in 1971. The jury acquitted both brothers on the conspiracy count, Anthony on the three false filing counts, and Andrew on the one false filing account and on the failure to file in 1970; Andrew was convicted of failing to file in 1969 and 1972.

The government's case consisted primarily of the testimony of persons who said they had made sporting wagers and lost ("bookmaking" testimony), and had played blackjack in a game where the "house" took a "cut" of each hand ("blackjack" testimony). The government's theory was that appellant and his brother were owner-partners in these gambling operations and had failed to declare income therefrom. There was also testimony that appellant had received income from certain stocks in 1969, that he and his brother had each been given 5000 shares of stock in 1972, and the these matters had also not been declared.

Appellant's defense, established through the government's own witnesses as well as by the presentation fo defense witnesses, was that appellant was a degenerate gambler who had no ownership interest in the gambling operations or the stocks. From 1969-1971 one Benjamin Balsamo, appellant's brother-in-law, owned the gambling operations (under the name of "Wilson") and in 1972 appellant's

brother Anthony took over when Balsamo became ill. The stocks were purchased by appellant for Balsamo with the latter's money and the income therefrom went to Balsamo.

Firstly it will be contended that the evidence was wholly insufficient to establish beyond a reasonable doubt that appellant wilfully failed to file income tax returns in 1969 and 1972; in particular, it will be demonstrated that there was insufficient proof that he received any "income" within the meaning of the income tax laws or that any omission in filing returns was wilful. The judge's charge on wilfulness will also be challenged as defective. (Point I)

It will next be contended that many of the pieces of evidence which the jury was permitted to consider were erroneously admitted: e.g., the jury was told that it was a question of fact whether a 5000 share stock certificate constituted income to appellant in 1972, whereas, because of restrictions on its sale, the Court should have ruled that it was not income as a matter of law (Point II(a)); the jury was also permitted to hear a "recapitulation" of the testimony of prior government witnesses by an IRS agent which was both legally improper and factually incorrect (Point II(b)). In addition to the wrongful admission of the foregoing, the lower Court improperly excluded crucial evidence bearing on the issues of wilfulness, i.e., that appellant had been advised that the 5000 shares of stock was not income (Point II(c)).

The indictment specifically charged that appellant "operated" a gambling business and failed to report the "gross wagers received, the expenses incurred, or any other information relative to this business." The trial court, however, permitted testimony that appellant had other unreported ~~sums~~ e.g., capital gains and/or a salary as a "worker" or "runner" in Balsamo's operation; permitted the prosecutor to tell the jury that appellant could be convicted if they found he failed to report those sums, and charged the jury in such a way as to permit a conviction on this theory. This constituted a prejudicial variance and amendment of the indictment and requires reversal (Point III).

Based on the inclusion in the indictment of a highly suspect conspiracy count, the lower court had denied a severance motion. However, during the trial the judge did not admit evidence against both defendants "subject to connection" but, rather, limited the evidence to the defendant being testified about. While superficially favorable to appellant, this procedure actually was seriously prejudicial: since no charge (other than conspiracy) had been brought against appellant's brother Anthony for 1972, all evidence given as to that year was admitted solely against appellant. Furthermore, the trial court never told the jury not to consider this evidence against appellant if it found no conspiracy. The combined effect of the misjoinder and refusal to sever deprived appellant of a fair trial (Point IV).

As noted, the jury acquitted appellant of conspiracy, wilful failure to file in 1970, and false filing for 1971; in addition

appellant's brother was acquitted of all charges. It is contended that these verdicts were repugnant to the guilty verdicts returned against appellant, and these latter verdicts must be set aside. (Point V).

#### STATEMENT OF FACTS \*

##### Government's Case

Rita Schlegel, accounting technician for Internal Revenue, testified that appellant filed a joint income tax return with his wife in 1971 but none in 1969, 1970 and 1972 (T. 56-66)\*\*. Over objection, the witness also said that appellant and his wife had filed joint returns in 1966-1968 (T. 66-75)\*\*\*.

Martin Friedman, certified public accountant, said he prepared appellant's tax returns for 1966-1968 and 1971 and appellant mentioned no income from gambling. (T. 76-83) Appellant's 1971 return showed \$3,000 income from a construction company. (T. 97)

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\* Since appellant was acquitted of the conspiracy charge, and the substantive charges relating to the years 1970 and 1971, none of the testimony concerning Anthony Garguilo in any year, and none of the testimony concerning appellant in the years 1970 and 1971 may be considered against appellant; only testimony concerning appellant in the years 1969 and 1972 may be considered on this appeal.

\*\* All numerical references preceded by "T" are to the trial transcript.

\*\*\* The objection to these returns was that they were outside of the purview of the indictment. The Court overruled this objection on the representation of the prosecutor that the returns were relevant to show appellant's awareness of the requirement that returns be filed, i.e., limited to the issue of wilfulness. The prosecutor, however, misused these returns. See Point II.

Joel H. Schwartz, college bookstore executive, said he met appellant in the late 1960's. Appellant apparently gave him a telephone number which he would call and leave his name and phone number; he would then be called back and he would place his bet on various sporting events. (T. 145-148) \*

Schwartz estimated he bet \$100,000 through this system between 1969 and 1972. (T. 149) (This figure represented the cumulative total of all the bets he made, and not his losses (T. 184)). He met with appellant periodically to "settle up," i.e., to be paid if he had won or pay if he had lost. (T. 146) He also bet comparable amounts with other persons. (T. 183-184) Although he believed he lost each year ("but not badly"), he did not say whether he was an overall winner or loser with the Wilson" system. (T. 174) \*\*

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\* This was the same procedure testified to by several other witnesses, all of whom testified that neither the voice at the number they called nor the voice that called them back was of appellant. One Casper Castiglia, a defense witness, testified that Benny Balsamo, using the name "Benny Wilson", set this procedure up. Balsamo would rent an apartment, put a telephone in it, and hire an answering service to respond to any calls. Castiglia testified that he (under the name "Harry Wilson") would periodically call this number, return the calls that had been left, and take the bets. He said appellant never performed this job of "sheet man." (T. 885-888, 907)

\*\* The government attempted to establish income to appellant by virtue of the testimony of this and every other witness that they were losers at gambling. Such testimony must, of course, be taken with a grain of salt, for if any of these witnesses had admitted that they won at gambling they would have been admitting income tax violations since none of them had declared such winnings on their returns. (T. 174, 223, 243, 355, 393, 472, 515)

Schwartz also said that he played in a blackjack game in Benny Balsamo's house in Brooklyn "in the early seventies -- '70, '71." (T. 150) The chips were worth between \$25 & \$100 and were gotten from the "dealers or from Benny or from Andy or whoever happened to have the chips to give out." (T. 150-151) Similarly, when he "settled up" at the end of the game it "could have been (with) anybody. It could have been Andy. It could have been Benny. It could have been one of the players in the game." (T. 151)\* There was a cut of up to 1% taken from each pot, but only if there were enough players; if there were too few players there was no cut, there was "no definite thing." The game was every Wednesday night and Schwartz played about 30 times in 1970 and 1971. (T. 152-153) He said the cut was for expenses (food; dealers, etc.). (T. 180)\*\*

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\* Benny and appellant were brothers-in-law and lived next door to each other during this period. (T. 177, 751-757) As Benny Balsamo frequently became too ill to conduct the game, appellant would stand in for him. (T. 161)

\*\* Contrary to the rules in Las Vegas, when any player here got blackjack he could take over the bank himself. Since some of the players either could not deal well, or simply did not want to deal, persons were hired to deal for anyone who had won the bank and did not want to deal. (T. 396-397)

In early 1972 Benny became ill and he died in the middle of the year. The game stopped for a while and resumed in Manhattan ("Churchill" apartments). He could not recall how long or how often he played in this game. (T. 152-153) Chips were given out by the first dealer or were finished by the people who were running the game or were obtained from other players - "every night it could have been different." The players would settle with each other at some other time and place, as there was no cash at the game. Appellant, again, always played and often lost. (T. 178) A full cut at this game was between \$1000 and \$1500 but such a cut was the "exception." As with the Brooklyn game, if there were too few players there was no cut. (T. 155-157)

In answer to the question who "ran" the game during these years the witness said:

"Well, (in the beginning) I would assume that the fact that I was in Benny's house, and he was there -- I mean it was -- it wasn't like it was a game (to Benny).\* I would assume that it was his game. Andy might have helped him. Or if Andy wasn't there, Benny would have handled it. If Benny wasn't there, Andy would have handled it.

\* \* \*

After Benny died,\*\* I guess Andy was the guy." (T. 161-162)

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\* For example, while appellant always participated in the game (T. 178). Benny usually was first there to give orders and didn't play. (T. 902, 911) Similarly at the Manhattan game appellant played and his brother gave the orders. (T. 848-849)

\*\* May 1972 (T. 750)

Arthur Leiberman was in the textile business and met appellant about six years earlier, i.e., sometime in 1970 (T. 191)\* He was invited to a blackjack game in Brooklyn and met appellant. He got chips from appellant and paid him for them. He played both in Brooklyn and in Manhattan and "guessed" the average cut was about \$1000. He played once or twice a month in 1972. (T. 191-197) He said appellant played every game and he saw appellant lose. (T. 222-223)

On cross-examination he said that he always lost money so he never put his wins and losses on his income tax returns. (T. 202-222)

Leon Mayer a commodity broker, said he met appellant when he was invited by Benny to his blackjack game. He testified that he bought chips from Benny when he entered and paid Benny for his losses when he

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\* Leiberman testified on October 1, 1976 and said he had met appellant "about six years earlier." Although this would have been sometime in late 1970, the prosecutor sought to extend this back to 1969 (T. 191-192), and then incorporated the earlier date into later questions (see, e.g., T. 195 lines 4-6). This distortion of the witnesses' answers was important because defense witnesses would testify that this game did not start until 1970. (T. 758, 817-821) The prosecutor also distorted the answers of a witness in another area. One Herbert Haskell testified that his gambling losses were to an organization which merely employed the Garguilos (T. 421), and that he had only inserted the Garguilos' name in an affidavit concerning his losses because IRS agents insisted on it. (T. 426) Despite this, the prosecutor repeatedly asked questions about the witness' losses "to the Garguilos" (T. 432, 433, 436, 452, 455, 475). See Point I.

left. (On occasion he also got chips from appellant.)(T. 225-227)  
If he needed credit, Benny would extend it. (T. 239) He also bet on sporting events with Benny. (T. 241) He said there was a minimal cut of \$5 - \$15 per pot, each pot lasted about ten minutes, the game lasted from approximately 9:00 P.M. - 1:30 A.M., and there were breaks for food, etc. (T. 228-229)

Benny died about June, 1972 and the game moved to Manhattan; he first played there in September or October, 1972. He bought chips from and settled with appellant. (T. 239-241) Appellant always played and if either of them got blackjack they sometimes took the bank as partners. His net loss at the blackjack games was \$1,000 - \$2,000. He never reported his winnings on his income tax because he believed that overall he lost. (T. 242-243)

Harry Meyer, an insurance broker, said he had done all his betting through the "Wilson" system or with appellant's brother, but did not know appellant at all. (T. 248-251) He settled his losses with Anthony Garguilo by mailing him checks or money orders or giving him money. (T. 253)

Based on his fifty years of betting experience, Anthony was not the top man or owner of the "book" but was "in the category of a worker or a runner or something like that." (T. 343)\* The "owner"

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\*Based on the government's theory that appellant and his brother operated the book and blackjack games both defense counsel elicited testimony that their clients were, at most, salaried workers. The subsequent arguments of the prosecutor and the charge of the court that appellant and his brother could be found guilty if they failed to report such salaries or tips were objected to as variances and amendments of the indictment. See Point III.

of the "book" did not meet, or settle up, with persons like Meyer who only bet \$50,000 - \$100,000 per year. (T. 317, 353, 356)

Although he said he "probably lost something" during the years he was betting with appellant's brother, he was really unable to say whether he won or lost in any particular year. He never reported his wins and losses on his income tax returns. (T. 354-355)

John Steven Haskell was in the textile business and from 1969-1972 worked for DHJ Industries. (T. 358)

For several months prior to March 1971 he had been placing bets through the telephone with the "Wilson" operation and settling up with a friend (Murray Madras) who had introduced him to "Wilson."\* (T. 360, 362, 364) On March 8, 1971 (T. 367) he was introduced to appellant's brother and began placing bets with him and settling with him. (T. 358-362)\*\* He also continued to settle with several other

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\* The method of placing bets was precisely the same as testified to by Joel Schwartz (T. 145-148) and that Casper Castiglia said was set up by Benny Balsamo. (T. 885-888)

\*\* In a prior affidavit he had stated that on "a rare occasion" he settled with appellant. (T. 365)

people from this organization. (T. 389) He concluded that appellant's brother and "Wilson" were somehow related to each other. (T. 361)

He also played blackjack in the Churchill apartment about five times in 1972. (T. 371) He got chips from appellant or his brother and settled up with them (T. 372) There were dealers to aid those less adept when they got blackjack and became the "bank;" these dealers were not working for, nor were they paid by, the "house," because there was no "house;" the dealers were paid by whomever they dealt for or by a cut ("nominal amount") being taken from the pot.\* (T. 396-397, 408-409)\*\*

At some point in 1972 he stopped gambling because he owed \$15 - \$20,000. (T. 379-381) This represented losses from his sports wagering as well as monies that appellant and his brother had paid to other blackjack players to whom he, (Haskell) had lost.\*\*\*

- \* The witness said he sometimes had a blackjack game at his house and it was played the same as the Churchill game except that whoever had the bank dealt for himself. (T. 403) Appellant, who was an "avid" gambler, player at these games, too. (T. 398)
- \*\* For reasons not set forth in the record, the pages of the transcript numbered "408-415" actually represent testimony following page 397 and preceding page 398. The correct pagination of the entire transcript, therefore, is 1-397, 408-415, 398-407, 416-end.
- \*\*\* When he left the game, it would be determined how much he owed and if he did not have enough money appellant or his brother would pay the winners and he would pay them back, i.e., they were links in "the chain through which debts might be paid and that winnings might be collected." (T. 387) He could have lost \$5,000 or more on any night. (T 412)

He was unable to pin-point which portion of this figure represented sports wagers and which represented repayments of monies that had been advanced for him (T. 385, 386, 387, 411-412), but he was definite that it was not all for wagers. (T. 411)

He never kept a record of how much he won or lost and he never put this information on his income tax returns. (T. 393)

Herbert Haskell, the father of the previous witness, said he was chairman of DHJ Industries. (T. 404) As with his son, he first met Anthony Garguilo on March 8, 1971 and made a bet with him on the Ali-Frazier fight. Murray Madras introduced Anthony as an "associate of a bookmaker." At about this same time he asked Madras how he (Mr. Haskell) could place wagers and Madras gave him the telephone number of "Mr. Wilson;" he believed that "Wilson" was "associated" with Anthony Garguilo or that they were with the same "office." (T. 405-407, 416) When the telephone number to place bets was changed, he was advised of the new number by the voice of "Mr. Wilson." (T. 419)\*

When he had to pay for a losing bet he cashed a check, put the money in an envelope and left it with his secretary for someone from "Mr. Wilson's office" to pick it up; if he won, the situation was reversed. A few times appellant came in to pick up these settlement envelopes and say hello;\*\* almost all of the time, however, the

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\* It is clear from the testimony of this witness that "Wilson" and Anthony Garguilo were not the same person.

\*\* It must be remembered that appellant had played cards with this witness' son and may well have known him from these games.

envelopes were picked up by a "Ben."\* (T. 419, 420) When asked by the prosecutor if these bookmaking losses were to appellant and his brother he said:

"No. I owed the money to whomever owned the bookmaking establishment, which I thought at that time was this fellow, Ben."  
(T. 421)

When shown an affidavit in which he had stated that the envelopes were left in satisfaction of "my obligation to the Garguilos and their associates," Mr. Haskell said that the Garguilos' names had been inserted at the insistence of the IRS agents. (T. 421-425)

The following colloquy then occurred:

"THE COURT: Mr. Haskell, apart from what is written out there, will you tell us what happened?

THE WITNESS: Well, it was in the middle of the day, Your Honor. And, as a matter of fact, the visits from the agents had been during business. And we had a sizable business and I had many problems at that point. And after several visits without pre-arranged appointments, just barging in and they sat down and said that I had to make or swear to a written statement, which I was willing to do on the following basis, and I had as a representative -- excuse me -- and as operating head of a company with a lot of stockholders, it was my duty to protect those stockholders and also the reputation of our company. And the thing that upset me the most was that if any publicity of this type would ever get out in the papers. So we sat and discussed what kind of statement. And this part of the statement was a compromise, because fundamentally I want to state, as I had stated here, that the payments were made to this bookmaking establishment. It was my understanding at that point that this fellow Ben owned it. The agents were pretty insistent that the name Garguilo be installed in this -- in this written statement. And it was only through compromise that as long as they had insisted on that, that I put in, "and associates" and the third party compromise, if any.

But fundamentally it should have been stated that this was a statement to the booking -- or the bookmaking organization, whoever was the head of it. That is true. That was to whom I -- my obligation was.

\* Obviously Benjamin Balsamo

THE COURT: Are you saying, then, that if you had sat down and written this statement on your own, without the discussions with the agent, it would have been to the effect that the payments you made were to the bookmaking establishment, which you thought Ben ran and with which the Garguilos were associated?

THE WITNESS: Associated or worked for, yes." (T. 425-427)

He said he usually discussed the status of his account with "Wilson," rarely with Anthony, and never with appellant. (T. 428)

In 1972 he owed over \$120,000 to the Wilson organization. (T. 434)\* He met with Anthony around April, 1972 and offered to give him 10,000 shares of non-negotiable stock; Anthony said he would let the witness know and subsequently told him to make one 5000 share certificate to himself and one to appellant. (T.455-463) After the company's lawyer took care of certain details, the stock certificates were signed on June 27, 1972. (T. 464)

Mr. Haskell said the stock certificates could not be sold on the open market for two years.\*\* He said he believed they could be sold to a brokerage house before that time at 25-30% of their value.

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\* Although the witness had testified that he lost this money to the "Wilson organization" the prosecutor continued to frame the question as though the money had been owed "to the Garguilos." (T. 432, 433, 436, 452, 455, 475)

\*\* The certificates bore the legend:

"These securities have not been registered pursuant to the Securities Act of 1933 and may not be sold, transferred, pledged or otherwise disposed of, unless, one; counsel for the corporation or other counsel satisfactory to it, advise the corporation that the proposed disposition of these securities will not violate the Securities Act of 1933, or, two; the securities are the subject of an effective registration statement filed under said act." (T. 496)

At that time the stock had a market value of \$22 per share. (T.464-465)

On cross-examination he said he never listed his gambling losses and wins on his income tax returns. (T. 472)

Richard Miller said he had handled the legal work on the above stock transfer. To effecuate the transfer he had to have appellant and his brother sign "investment letters" acknowledging the two year restriction on sales. He gave two such letters to appellant's brother and they were returned to him some weeks later.\* The stock transfer was then made. (T. 488-495)

On cross-examination it was brought out that the investment letters stated that the stock was being given as a "gift." (T.498, 499, 505)\*\*

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\* A handwriting expert testified that the signatures on these letters matched the signatures of appellant and his brother on their income tax returns. (T. 643-645) These letters stated:

"In order for this transfer to be approved by the Securities & Exchange Commission, it is necessary for you to acknowledge the following:

\* \* \*

In further compliance with present rules and regulations of the Securities & Exchange Commission, you further represent and agree you will not under any circumstances sell or distribute these shares for a period of two years from the date on which these shares are issued to you." (T. 498-499)

\*\* At a later point in the trial the prosecutor was permitted to enter into evidence a form that Anthony Garguilo filed with the SEC in 1974 stating that he had received the stock "in settlement of an obligation." Counsel for appellant had objected on the ground that this would spill over and prejudice appellant but the motion was denied. (T. 648-654) See Point IV. The Court also subsequently denied appellant the right to admit a letter (Note-footnote continued on following page)

David Roth was in the apparel business and met appellant in 1972 at a card game in John Haskell's apartment. (T. 506-507)

He played in the Churchill apartment game 10-12 times, buying chips from and paying appellant. (T. 508-509) There was no cut taken from the game. (T. 509) He said appellant always played at these games and was a "degenerate" gambler. (T. 514) He was given a telephone number by appellant and he made sports wagers by betting with a voice at that number. He settled up with appellant. (T. 510-511) He estimated his gross bets at \$10,000 and his losses at \$5,000. (T. 511) He did not know if he won or lost at the card games. (T. 515) He never put his wins or losses on his income tax returns. (T. 515)

Charles Joseph Plohn testified concerning appellant's margin stock account and identified six checks that had been sent to appellant in 1969 totalling \$26,000. (T. 541-554)

Irving Wax testified that he was an IRS agent, had been in Court throughout the trial and had reviewed the testimony of all of the witnesses. (T. 580)\*

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\*\* from a lawyer, also written in 1974, stating that the stock was not income in 1972. (T. 810-816) See Point II(c)

\* His testimony was objected to on the grounds that it was an unnecessary and improper recapitulation of the testimony of prior witnesses and, in particular, contained prejudicial references to income taxes due. The Court ruled the recapitulation proper and the testimony about taxes due proper re: the failure to file charges, but improper re: the fraudulent filing. (T. 556-579) See Point II(b).

He computed appellant's income for 1969 at \$16,219.69; \$6,219.69 represented a capital gain on the Plohn stocks and \$10,000 represented appellant's alleged one-half share of the cut from the Brooklyn blackjack game (based on Arthur Leiberman's testimony).<sup>\*</sup> The tax on this amount was \$3,411.68. (T.593-600, 607)

He computed appellant's income in 1972 at \$46,595; \$27,500 from the DHJ stock certificate,<sup>\*\*</sup> \$12,500 from the bookmaking (one-half of John Haskell's \$20,000 loss and one-half of David Roth's \$5,000 loss), and \$6,965 from the Manhattan blackjack game (arrived at by taking the average figure of the cut testified to by Leiberman, Joel Schwartz and Leon Mayer). The tax on this amount was \$13,638.20. (T. 602-604, 609)

On cross-examination Wax said that he concluded that appellant and his brother were partners from the testimony of the bettors. (T. 612, 618) He admitted that he had no figures as to gambling or

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<sup>\*</sup> It must be remembered that Leiberman was the witness whose testimony that he had met appellant "about six years ago," i.e., in 1970, had been converted by the prosecutor to 1969. (T. 191) Wax used this improper conversion in his computations.

<sup>\*\*</sup> Wax said he arrived at this figure by using a selling price of \$2 per share and assuming a fair market value of 25%. (T. 602) Needless to say, this would give a figure of \$2,500 for the 5000 shares appellant allegedly received. More will be said about the deficiencies in Wax's figures in Points I & II(b).

personal losses or expenses of appellant or his brother so he could not determine if the gambling operations had resulted in a profit. Nonetheless, he used the gross figures of the bettors' losses to determine the income tax owed. (T. 619, 625-626, 627)

The government then rested and motions to dismiss were denied. (T. 654-739)\*

#### The Case for the Defense

Louise Balsamo testified that she was the widow of Benjamin Balsamo who had died on May 20, 1972. Appellant had married her sister and was her and Benny's brother-in-law. (T. 750)

From 1969 to the present she lived at 859 53rd Street in Brooklyn. The house always belonged to her husband but he had put it in appellant's wife's name because he (Balsamo) had had problems with the IRS and could not show that he had money to buy the home. (T. 751-755) Benny also owned 853 53rd Street, which was two doors away, but title to that house had been in a cousin's name. (T. 755) Both houses were now in the name of Mrs. Balsamo. (T. 755) Appellant lived in a walk-in apartment on the first floor of 859 53rd Street until the middle of October 1969, at which point he moved to 853. The rent at 859 was only \$110 per month and that at 853 only \$125; however, because of his continuous gambling losses appellant often could not pay even that low rent. (T. 767) When appellant moved out

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\* The government was also permitted to introduce Anthony's 1972 tax return showing \$180,000 in "Sullivan case," i.e., gambling income. (T. 738) Since there was no false filing charge against Anthony for 1972, this evidence was admitted only against appellant. See Point IV.

of 859, one John Polizzi moved into the walk-in apartment and lived there through March 1970. (T. 756-757)

In the years 1969-1971 her husband Benny was a bookmaker; also, beginning in March 1970, after Polizzi moved out, Benny ran a blackjack game in the walk-in apartment at 859 53rd Street.\* The game and the book were Benny's and he had no partners; he did use runners in settlement of his wins and losses and these persons also got a percentage of the action they brought to him. (T. 758,771,775)

Benny hired and paid the people who worked as waitresses and dealers at the game, and gave all the orders at the game. (T. 764, 809) Appellant was at the game only as a player, although he did help out at the game if Benny got too sick on any given night;\*\* he also helped Benny out by making collections. (T.759) Benny would pay appellant for helping him out; he told his wife the money was "enough," but because of appellant's gambling losses it was insufficient to pay his bills. (T. 789)

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\* Benny had numerous gambling arrests during this period. (T. 775)

\*\* Mrs. Balsamo confirmed that although appellant's brother sometimes stopped by to say hello, he had no interest in the game as a player or owner, and gave no orders. (T. 774)

Benny gave up the gambling operation because of a heart condition around January 1972. (T. 785-786) He did not turn the operation over to anyone. (T. 795)

Appellant's parents had to lend him money to cover his gambling debts. (T. 765) Benny tried to stop him from gambling because he always lost; Benny often lent him money so that he could pay shylocks and other bookies. (T. 768-769, 772) Appellant's wife often had to borrow money from Mrs. Balsamo in order to buy food; they had no car and never took a vacation. (T. 770) No one, however, was able to stop appellant from gambling. (T. 759)

Beginning in 1969 Benny asked appellant to purchase some stock for him but to put it in appellant's name. Benny would give appellant the money for the stock and appellant would sign the papers to buy it. Benny told him what and when to buy and sell and when the stock was sold appellant gave the money to Benny. This went on through 1972. (T. 763, 802-802a)

Benny never filed any income tax returns in 1969, 1970 or 1971. (T. 785)

John Polizzi was a 73 year old retired longshoreman who lived in the walk-in apartment at 859 53rd Street from October, 1969 to March, 1970; various gas and telephone bills paid by him during this period were received in evidence. (T. 817-821) He said that he never gambled and because of a heart attack he rarely went out; there was no blackjack game in his apartment on Wednesday nights while he lived there. (T. 821)

Marida Garguilo, appellant's sister, testified that she had

been present at many family discussions where attempts had been made to stop appellant from gambling. During the period 1969-1972 appellant had no regular income; he received some money for his irregular help at their parent's florist shop. She, her parents and Louise Balsamo had all made loans to appellant to pay off his gambling debts. In July, 1972 she loaned him \$6,000 to pay off such debts; he repaid her over a three-year period. (T. 827-837)

Therese Geritano, Louise Balsamo's sister, testified that Benny hired her as a waitress in 1970 when he began his blackjack game and he gave her all her orders; appellant just played in the game. (T. 840-843) When the ame moved to the Churchill apartments, appellant's brother Anthony asked her if she wanted to work as a waitress for him and she did; Anthony gave her orders ans appellant just played in the game and occasionally helped Anthony give out the chips (but did not get any money). (T.846-849,862)

She had also been a runner for Benny's bookmaking operation, using the signal, "Wilson sent me;" she received \$100 for doing this.(T.845,868)

At Benny's request she had put the house at 853 53 St. in her name. She had also bought and sold stock in her name for Benny, using his money to buy, giving him the proceeds, and taking instructions from him. (T. 852-854)

Anthony Matrone testified that he was a first cousin to appellant and loaned him about \$1,000 in each of the years between 1968 & 1971 to pay off appellant's gambling debts. (T. 874-883)\*

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\* The jury was instructed that loans were not to be considered income. (T. 1130)

It was stipulated that Anthony Garguilo signed a lease for the Churchill apartment in January, 1972. (T. 884)

Casper Castiglia testified that he began working in Benny Balsamo's bookmaking operation in 1969. Balsamo was known as "Benny Wilson," he was known as "Harry Wilson," and the operation was known as the "Wilson" office. (T. 885-886)

Balsamo - "Wilson" would rent an apartment, get a phone and give him the number; he would call every fifteen minutes and the service would say "call so and so;" he would call, say he was "Wilson," and take the bets; he was known as a "sheet-writer." (T. 885, 887-888) Each day he took the "sheet work" to Benny's house on 53 Street. (T. 891) Balsamo, who gave him all his orders, also gave him a number to call to get the daily odds and betting lines; he would call and say "Wilson;" this was a service for bookmakers. (T. 892) Sometimes he would be a runner for Benny and occasionally he even got people to bet with him, but all of the money went to Benny "Wilson." (T. 889) No one else used the "Wilson" name and neither appellant nor his brother ever took bets or collected for the bookmaking operation. (T. 907)

In 1970 he also began working in Benny's blackjack game as a dealer. Benny paid him \$20 and gave him all his orders. He worked in the game until it ended in the beginning of 1972. (T. 894-895) Appellant played in this game all the time. If appellant lost all of his money he could borrow some money; on occasion, the witness lent him money. Appellant was an "habitual" gambler and loser.

(T. 897, 900, 910)

Benny did not play in the blackjack game nor did he make anything more than an occasional bet, and that is why he could run the gambling operation. (T. 902, 911)

The jury verdict found appellant guilty of failing to file in 1969 and 1972 and acquitted appellant and his brother of all other charges. (T. 1157-1158)

#### Sentence

On December 10, 1976 appellant was sentenced to six months in prison followed by three years probation, and a five thousand dollar fine.

#### POINT I

AS A MATTER OF LAW, NO REASONABLE  
JURY COULD HAVE FOUND BEYOND A  
REASONABLE DOUBT THAT APPELLANT  
WILFULLY FAILED TO FILE ANY REQUIRED  
INCOME TAX RETURN: ACCORDINGLY, THE  
LOWER COURT ERRED BY REFUSING TO GRANT  
A MOTION FOR A DIRECTED VERDICT OF ACQUITTAL

To establish a violation of 26 U.S.C. Section 7203, the prosecutor had to show (1) that appellant was a person "required to make a return," i.e., that he received income in excess of \$600 for 1969 and \$2800 in 1972 and (2) that appellant wilfully failed to file such return. Unfortunately for the prosecution, a careful analysis of the evidence reveals that neither of these elements was established to the degree necessary to even put this case before the jury, much less beyond a reasonable doubt.

In United States v. Taylor, 464, F. 2d 240, 243 (2nd Cir., 1972)

this Court adopted the following rule for determining issues of sufficiency:

"The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

The Court cautioned that, of course, "The jury may not be permitted to conjecture merely, or to conclude upon pure speculation..." Ibid. It is respectfully submitted, however, and it will be demonstrated, that this is precisely what occurred here.\*

A. THE GOVERNMENT DID NOT ESTABLISH THAT APPELLANT RECEIVED ANY INCOME

Looking at the count involving 1969 first, the government sought to establish income to appellant from two sources: one-half of the alleged cut from a blackjack game and some capital gains.\*\*

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\* Throughout this discussion the evidence will be viewed, as it must, in the light most favorable to the government. United States v. Freeman, 498 F. 2d 569 (2d Cir. 1974). This means that the truthfulness of all the government witnesses will be assumed (which gives appellant no pause since they helped to establish his defense) and all of the proper inferences will be drawn therefrom. France v. United States, 164 U.S. 676, 681 (1896). Cf. United States v. Taylor, supra ("justifiable" inferences). Taking the view of the evidence most favorable to the government does not mean, although the government frequently contends, that only the inferences favorable to the government may be drawn. The discussion of the drawing of inferences in the Taylor case, without any reference to a requirement that only those favorable to the government be drawn (464 F.2d at 244-245), makes this clear. See, also, United States v. Tavoularis, 515 F.2d 1070, 1074-1075, (2d Cir. 1975) (improper to draw "inference (which)...would verge on the irrational"). United States v. Freeman, 498 F.2d 569, 574 (2d Cir. 1974) (conviction reversed because based on "negligible, indeed almost non-existent, inferences").

\*\* On following page

The government's theory was that appellant and his brother Anthony were operating a gambling "partnership" with one-half of the profits going to each of them. (T. 12-13, 328, 330, 335, 374, 376, 459, 662-705) Their own expert, Irving Wax, however, was forced to admit on cross-examination that the only figures he could cull from the testimony of the prior government witnesses amounted to the gross receipts\* of the asserted partnership, and without any figures for losses, expenses, deductions, etc., he could not determine if the partnership had any profit; the figures he attributed to appellant and his brother as "income" were based only on the gross receipts figures. (T. 618-635) It is appellant's position that the foregoing is equivalent to a total failure of proof on the part of the prosecution and appellant was entitled to an acquittal.

\*\* Irving Wax, the government "expert, used Arthur Leiberman's testimony to attribute \$10,000 of income to appellant from this game, and used the Charles Plohn Company account records to find \$6,219.69 in capital gains. For the purpose of the sufficiency issue, the admissibility of Wax's testimony will be assumed. In Point II(b), however, it will be established that his testimony should have been excluded because it was egregiously inaccurate as well as irrelevant and prejudicial. Furthermore, in Point III it will be contended that, at least with regard to the stock income, his testimony should have been excluded as an impermissible variance from the indictment.

\* Frequently mis-typed as "grocery receipts."

The lower court misconstrued the thrust of appellant's argument and thought counsel was contending that because the government did not prove any partnership return was filed that fact was a complete defense to the charge of failure to file an individual return. (T. 667-669) Counsel repeatedly stated that this was not his contention, and that he was arguing that the prosecution's failure to prove partnership profit and/or distribution of income to appellant required dismissal of the charges.\*

26 U.S.C. Sections 761 defines a partnership as a "syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on..." Sections 701-755 require that a partnership must file an informational return and a partner must declare income on whatever portion of the profit is distributed to him. Clearly what the government alleged appellant and his brother were doing was a partnership; however, and just as clearly, the government completely failed to show any profit or distribution of income to either "partner."\*\* The charges should have been dismissed.

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\* A request to charge to this effect, joined in by appellants counsel, was denied. (T. 1123-1124, 1127-1128)

\*\* As counsel said: "They indicted him incorrectly. They should have said (one) they failed to file a tax return...a partnership return (and) two they should have proved they made a profit...here and the profit factor should have been included on their individual returns." (T. 669)

When the trial court overruled the aforementioned motion, appellant then presented the defense that he was not a partner in the gambling with anyone and that the entire operation was owned by someone else.

Turning first to the evidence concerning the blackjack game, it is crystal clear that that game did not even exist in 1969 but only started some time in 1970.

As noted, Arthur Leiberman did not testify that he played in the Brooklyn blackjack game in 1969; he said it was about six years ago, i.e., about October 1970. (T. 191) It is true that by casually but continually inserting the year "1969" in his later questions the prosecutor appeared to get Leiberman to testify to the blackjack game existing in that year (See, e.g. T. 191-192, 195), but this ploy will not fool this Court.

The testimony of the other two government witnesses who testified that they played in the game supports the conclusion that it did not begin until after 1969. Joel Schwartz said that he met appellant in the late 1960's but first played in the blackjack game "in the early seventies -- '70, '71." (T. 150) While it is true that Leon Mayer said he met appellant at Balsamo's blackjack game "about 1969 or 1970," he said he really was unsure of the date (T. 225); moreover, since he said he played blackjack in both the Brooklyn and Manhattan games for a total of "maybe a year and a half, two years" (T.243), and since he was playing in the Manhattan game in September and October 1972 (T. 240), his earliest participation in the Brooklyn

game would have been in late 1970.\*

If any more proof is needed it was given by Mrs. Balsamo, who testified that her husband began the blackjack game in 1970; (T. 756-758) by Mr. Polizzi, who testified that he lived in the apartment where the blackjack game was later held from October 1969 through March 1970 (and who documented his testimony with gas and telephone bills) (T. 817-821), by Theresa Geritano who said she was hired to work as a waitress when Balsamo began the game in 1970 (T. 841); and by Casper Castiglia, who testified that he was hired to work as a dealer in that game in 1970. (T. 893A-894)

Assuming, without conceding, that the game began in 1969, any "cut" taken therefrom was not income to appellant because it was not appellant's game.\*\*

This game was run in Benjamin Balsamo's house, with food, waitresses and dealer supplied and paid for by Balsamo, and with Balsamo being the owner of the game.

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\* In deciding which inference the jury could draw from this testimony, it must be remembered that they could only draw "proper" (France v. United States, supra) or "justifiable" (United States v. Taylor, supra) inferences; there was no requirement that they draw only the inferences favorable to the government.

\*\* It is suggested that the jury's request for the Plohn Company accounts' testimony (T. 1150) indicates that they had accepted this defense. (They also focused on the non-gambling income for 1972. (T. 1142))

Every single witness who was asked, both for the government and for the defense, said that this was Benny Balsamo's game. Joel Schwartz said:

"Well, (in the beginning) I would assume that the fact that it was in Benny's house, and he was there....I would assume that it was his game." (T. 161) (emphasis added)

Herbert Haskell testified that he believed Balsamo was the owner of a "bookmaking establishment" he bet with. (T. 421)\* In a very revealing statement he said that he had only put appellant and his brother's names into an affidavit about who he owed money to because IRS agents insisted upon its insertion. (T. 425-427)\*\* C. Black v. United States, 534 F.2d 524, 526, 528, N.5 (2d Cir. 1976) (claims of harassment by IRS agents)

Mrs. Balsamo testified that the blackjack game was her husband's and both Theresa Geritano and Casper Castiglia said that Balsamo hired them to work in his game. (T. 756, 841, 893A)

In addition to this overwhelming direct evidence, there was a vast amount of circumstantial evidence that Balsamo was, and appellant was not, the owner of the game.

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\* Casper Castiglia and Mrs. Balsamo testified the book blackjack game were owned by the same person - Benjamin Balsamo.

\*\* At trial the prosecutor continued this tactic by inserting the Garguilo's names into questions about who Haskell owed money to despite Haskell's insistence that he owed the "owner" of the book. (T. 432, 433, 436, 452, 455, 475)

Schwartz and Castiglia both noted that Balsamo rarely played in the game, spending his time giving orders to the waitresses and dealers, and deciding if credit would be extended to those who asked for it. (T. 239) Appellant, on the other hand, being a compulsive and degenerate gambler, spent most of his time playing and losing; Castiglia made a very telling point when he said that if appellant lost during the game he could not continue to play unless someone would lend him money (T. 900), and that is hardly what one would expect if appellant owned the game! As a matter of fact, it was Balsamo's apparent lack of personal interest in gambling that permitted him to run the game (T. 911). Lastly, everyone testified that when Balsamo died the game stopped for a while, and that is another indication that he owned the game.\*

It is true that appellant occasionally gave out chips and/or was paid for them and occasionally made collections to settle up with losers, but this would not permit, much less compel, an inference that he owned the game. All of the government witnesses said that the process of receiving and paying for chips was entirely random: it could have been with Balsamo, appellant, appellant's brother, one of the other players or one of the dealers (see e.g., T. 151). That appellant may have made some collections for Balsamo actually cuts against his being the owner of the game for, as Harry Mayer said

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\* In summation, counsel told the jury that if Balsamo had lived he would have been indicted and appellant would still be on the street looking for another card game. (T. 1059)

(based on his fifty years of gambling experience) the owner of such a game would not settle up with persons who only bet \$50 - \$100,000 per year. (T. 317, 343, 353, 356)

Furthermore, all of these activities are explainable by appellant's close family relationship to Balsamo, combined with the fact that Balsamo often ill and could not do these things himself. It may be difficult for lawabiding persons to believe that one would commit such criminal acts as a mere favor to another, but, to paraphrase Judge Friendly in United States v. Freeman, supra, 498 F.2d at 576:

"The mores of the world where appellant lived are not those of judges or clergyman, and the inference that his criminal activity was that of a worker or runner or helper, and nothing more, is far more compelling than the inference that he was the owner of the game."

Much of the foregoing applies to the capital gain supposedly received by appellant.\*

Mrs. Balsamo testified that her husband had income tax problems in the late 1960's in that he was making a lot of money from his illegal bookmaking operation but could not show it. He purchased two houses in other persons' names. In 1969 he began purchasing stock using appellant as a front: he gave appellant the money for

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\* Wax testified that the purchase price of the stocks in the Flohn account was \$57,152.96, the sale price was \$60,362.00 and the profit was \$6,219.69. (T. 594) Of course, this last figure is in error and should be \$3,209.04. This is only one of numerous errors Wax made. See Point II(b). Once again, it must be kept in mind that the capital gains testimony was inadmissible because it impermissibly varied the indictment (Point III), especially since the prosecutor and the judge specifically said this sum was "not (Footnote continued on following page)

stock, told him what and when to buy and sell, and received all the proceeds. (T. 763, 802-802a) Theresa Geritano testified that she had also bought and sold stock for Balsamo and had held one of his homes in her name. (T. 852-854)

The testimony that the stocks did not belong to appellant was corroborated by testimony that during 1969 appellant could not meet his \$110 -\$125 rent payments, that his wife had to borrow money to buy food, that he did not own a car or take a vacation, that he borrowed money from his parents, Mr. and Mrs. Balsamo, his sister, his cousin and, apparently, even those he played cards with. (T. 765, 767, 768-769, 770, 772, 827-831, 874-883, 900) It is, therefore, inconceivable that he could have had over \$57,000 with which to purchase stock during that year. Since, as was demonstrated by the evidence, the capital gains were not appellant's, they were not taxable income to him. Poonian v. United States, 294 F.2d 74, 75-76 (9th Cir. 1961).

Even assuming that the prosecution proved that at some time appellant derived income from a gambling operation, they did not do so for 1969. As was demonstrated supra, the Brooklyn blackjack game did not start until 1970 and no witness testified to a bookmaking loss

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\* "gambling proceeds." (T. 1071, 1105)

in 1969;\* accordingly, the money to purchase this stock, wherever it came from, did not come from appellant in 1969.

In sum, there was no evidence that the blackjack game began in 1969 because all of the evidence is that it began in 1970. Even if it had begun in 1969 it was Benjamin Balsamo's game, and not appellant's. Any income either directly (in the form of "cuts") or indirectly (in the form of the profit from stocks purchased with such "cuts") from that game belonged to Balsamo and not to appellant. Any verdict that appellant received such income in 1969 could only be based on the jury indulging in "conjecture merely, or...pure speculation" (United States v. Taylor) based on "inferences verging on the irrational" (United States v. Tavoularis, supra) and such a verdict may not stand.

Turning to the conviction for failing to file in 1972, the government sought to establish income to appellant from three sources: a different blackjack game, a bookmaking operation, and the receipt of some stock. Once again they were unsuccessful.

Sometime in 1972 the Balsamo blackjack game ended and a new game began in the Churchill apartments in Mahnattan.\*\* However, just

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\* Wax's testimony contained no reference to bookmaking income to appellant or his brother in 1969.

\*\* At what point in 1972 this game began, and at what point the various witnesses began playing, are matters open to conjecture based on the record. This will be considered in detail in Point II(b). At this point, however, it will be assumed that the "cut" was (footnote continued on following page)

as appellant was just a player at the Churchill game which was owned by his brother Anthony.\* It was Anthony who rented the apartment for the game in January 1972, (T. 884) and it was Anthony who hired the help and gave the orders (T. 848-849, 862). Appellant just kept on playing and losing.\*\* In 1972 appellant borrowed \$6,000 from his sister and it took him three years to pay her back (T. 827-837); this is hardly the portrait of the owner of a highly successful blackjack game.\*\*\*

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\*\* sufficient to require that someone file a return. (although two government witnesses John Haskell and David Roth said there was no cut (T. 396-397, 408-409, 509)).

\* Schwartz's testimony that "after Benny died, I guess Andy was the guy" (T. 162) is not inconsistent with this, This statement immediately followed Schwartz's testimony about how appellant would fill in and help out for Balsamo (T. 161) and it is not at all clear that the witness realized he was talking about the new game at the Churchill. In any event, this assumption is contrary to all of the other testimony in the case.

\*\* Appellant, as well as his brother, gave out chips and settled up with the players. (Theresa Geritano, who worked as a waitress for Anthony said that he and not appellant settled up with the players. (T. 862)) As noted previously, however, this kind of ministerial or house-keeping activity, by itself does not indicate ownership, especially when appellant's action are recognized as merely helping out his brother. Cf. United States v. Freeman, supra.

\*\*\* If appellant and his brother were partners in this game one would have expected appellant to borrow money from his brother, but instead he went to his sister.

The attempt to impute bookmaking income to appellant is doubly suspect. First of all, it is not at all clear that, based on the testimony, any of the witnesses lost to the "book." David Roth testified that he lost about \$5,000 at the blackjack game and to the book but he could not say how much he lost to which. (T. 511, 515) John Haskell testified that at one point in 1972 he owed \$20,000 to appellant and his brother, but he, too, could not say if this represented bookmaking or blackjack losses; this situation was further complicated because Haskell had been advanced money by appellant and/or his brother to pay some of his blackjack losses to other players, and he could not say how much of this was represented in the \$20,000. (T. 379-411)

Secondly, and even assuming the jury could properly find ascertainable losses to the "book," it was either Anthony's or someone else's, but it was not appellants.\* Prior to 1972 the book, as well as the game, had belonged to Balsamo, and Anthony (and possibly his brother) had been runners. (T. 343) Anthony had much more involvement in the operation of the book, doing most of the collecting (T. 358-362) and discussing of accounts (T. 428) that

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\* Mrs. Balsamo testified that her husband stopped the blackjack game because of his ill health; since the game was at his home and required his presence and supervision, this makes sense. She did not, however, testify that he gave up the bookmaking operation at that time, this required little or no effort on his part and he may well have continued it up to his death in May, 1972. Therefore, for at least part of this year Balsamo may have been the owner with someone taking over after he died.

Balsamo did not handle; several witnesses came to conclude that Anthony was an associate of Balsamo. (T. 361. 405-407, 416) By comparison, appellant rarely made collections for Balsamo and never discussed accounts with bettors. (T. 365, 419-420, 428) In this connection, it must be remembered that IRS agents forced one witness to put the Garguilos name down as owners of the book even though he thought Balsamo owned it. (T. 425-427) It is true that this same witness said he believed Anthony did not own the book, but that similarly disqualifies appellant and means that someone above both of them owned it. In sum, there was no proof from which the jury could properly infer that any witness lost to the book in 1972 (United States v. Taylor, supra), and even if there was, this money did not belong to appellant. (Poonian v. United States, supra)\*

Turning lastly to the 5000 shares of DHJ stock, and assuming that they were considered taxable income to someone in 1972, the foregoing establishes that they did not belong to appellant.

Herbert Haskell testified that he gave this stock in satisfaction of a gambling debt owed to whomever owned the book. As noted, Haskell himself believed that to be someone other than Anthony, i.e., Balsamo. It is respectfully suggested that this belief was correct.

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\* As previously pointed out, the jury seemed to have rejected the blackjack or bookmaking testimony, (thereby accepting appellant's defense that someone else owned them) and focused on the stock transactions. (T. 1142, 1150)

As noted previously (see second preceding footnote) there was no testimony that Balsamo gave up the book (as opposed to the black-jack game) before he died. Haskell discussed the stock transfer with Anthony in April 1972, when Balsamo was still alive. Anthony said he would have to let Haskell know, indicating that he had to get permission from someone else. Since Balsamo was then using appellant and others to take other stock in his name, it makes sense that he would have told Anthony to take the stock in his and appellant's names. Although the stock was not transferred until after Balsamo's death, this does not mean that appellant and his brother got the stock for themselves; Balsamo's wife, their sister-in-law, was still alive and living next door to appellant and was, no doubt, the intended new beneficiary. The conclusion that the stock was to pay a debt to Balsamo is strengthened by the fact that Haskell said a portion of the \$120,000 he owed in 1972 was carried over from 1971, and it is clear that in 1971 Balsamo owned the book.

If Balsamo did not own it, perhaps it was Anthony or someone else. In any event the evidence was wholly insufficient to establish that it was appellant. Accordingly, the stock was not taxable income to him. Poonian v. United States, supra.

B. THE GOVERNMENT DID NOT ESTABLISH THAT ANY FAILURE TO FILE RETURNS WAS WILFUL AND THE JUDGE'S CHARGE ON THIS ISSUE WAS IN ERROR.

The only evidence that the government set forth on the issue of wilfulness was that appellant and his wife filed income tax returns in 1966-1968 and 1971. In view of the only slight relevance

of this evidence, and particularly in view of the countervailing evidence, it could not support a finding of wilfulness beyond a reasonable doubt.

Firstly, it must be noted that both the prosecutor and the Trial Court misused this evidence. When the prosecutor offered the pre-indictment tax returns into evidence, appellant's counsel objected that they were irrelevant. (T. 72-74) The Court said it was overruling the objections because the fact that prior returns were filed was relevant on the issue of knowledge that subsequent returns had to be filed. (T. 93)

Since a 1971 return was filed the pre-indictment returns would seem to be irrelevant or cumulative. More importantly, both the prosecutor (T 968) and the Court (T. 1096) told the jury that the fact that refunds were asked for on the filed returns was relevant to the issue of wilful failure to file other returns; that is, the jury could infer that the reason appellant had not filed returns in 1969, 1970 and 1972 was because he would have had to pay the government rather than obtain a refund.\* The prejudicial misuse of this barely relevant evidence itself requires reversal.

Secondly, even if this evidence had been properly admitted and properly used, the Court's charge on wilfulness failed to take into

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\* Counsel objected unsuccessfully to this portion of the Court's charge. (T. 961)

account the substantial countervailing evidence and constitutes reversible error.

Each and every prosecution witness testified that they did not declare the income they received from gambling because they lost more than they won. Since all of these witnesses, as well as all of the defense witnesses, agreed that appellant was an habitual loser it is probable that even if he did receive income from gambling he believed he did not have to report it because, over-all, he lost. The fact that his belief was legally incorrect does not mean that it was irrelevant to the issue of his wilfulness; he was entitled to a charge on this matter. United States v. Platt, 435 F.2d 789 (2d Cir. 1970) It was plain error not to give it. United States v. Howard, 506 F.2d 1131 (2d Cir. 1974); United States v. Clark, 475 F.2d 240 (2d Cir. 1973); United States v. Fields, 466 F.2d 119 (2d Cir. 1972)\*

Similarly, the Court failed to charge that if appellant did not report the 5000 shares of stock because he thought it was not taxable income to him in 1972, despite the legal incorrectness in this belief, this was relevant to wilfulness. This, too, was plain error, (United States v. Howard, supra; United States v. Platt, supra) especially

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\* This omission is not remedied by the giving of the abstract charge that conduct is not wilful if due to a misunderstanding of the "requirements of the law" (T. 1095). Since the lower court never marshalled the evidence there is no way the jury could have applied the quoted passage to the above testimony.

in view of the Court's refusal (incorrectly, we will contend in Point II(c)) to admit evidence in support of that belief.

Lastly, the Court did not charge that appellant's belief, that if no partnership return was filed or no partnership profit shown he did not have to file a return, was relevant to the issue of wilfulness, even if incorrect as a matter of law. This is almost inexplicable, since counsel had vigorously argued this point throughout the trial and the Court had specifically agreed to so charge and included such an instruction in the proposed charge it read to counsel. (T. 935-936) Counsel had the right to rely on the judge charging as he had said he would and his unawareness that the Court removed this portion of the charge may in no way be construed as a deliberate waiver. United States v. Hilton, 521 F.2d 164 (2d Cir. 1975).<sup>\*</sup> In any event the fact that the trial judge himself thought the charge important enough to put in his proposed charge labels its removal from the final charge "plain error." United States v. Howard, supra; United States v. Platt, supra.<sup>\*\*</sup>

In sum, the evidence was insufficient to permit a finding of wilful failure to file beyond a reasonable doubt, especially in view

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<sup>\*</sup> This situation is the reverse of United States v. Alo1, 511 F.2d 585, 595 (2d Cir. 1975) where counsel's failure to ask for a particular charge was held to be a waiver, because they had been shown the trial judge's proposed charge which did not contain what they said, for the first time on appeal, they had wanted.

<sup>\*\*</sup>Footnote on following page.

of the individual and cumulative effect of the errors in the judge's charge.\* Appellant's convictions must be reversed.\*\*

## POINT II

### THE COURT COMMITTED REVERSIBLE ERROR IN THE ADMISSION AND EXCLUSION OF EVIDENCE AND THE CHARGES THEREON.

#### A. THE DHJ STOCK

Herbert Haskell testified that in 1972 he transferred 5000 shares of DHJ stock to appellant in satisfaction of a gambling debt. Although the stock bore the legend that it could not be disposed of in any way for two years, Haskell opined that it could have been sold, but not on the open market, at 25-30% of its value (then \$22 per share). (T. 455-465)

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\*\* Here, too, the boilerplate reference to "misunderstanding of the requirements of the law," (T. 1095) is insufficient to remedy the error.

\* The "crazy-guilt" pattern (or, rather, non-pattern) of the jury's verdict itself indicates that the evidence and the judge's charge were unsatisfactory to them. (See Point V)

\*\* If this Court reverses on one but not both counts there must be a remand for resentencing. United States v. Mapp, 476, F.2d 67. (2d Cir. 1973)

The first question the jury asked during its deliberations was whether this stock could be considered income to appellant in 1972. Counsel contended that it could not, because of the restrictions, but the Court, over objection, ruled that this was an issue for the jury. (T. 1134, 1142-1148) This was error.\*

In Propper v. Commissioner of Internal Revenue, 89 F.2d 617 (2d Cir. 1937), this Court held that stocks subject to 90 day and 5 year restrictions on sale were, by virtue of these restrictions "strip(ped)...of an ascertainable market value." Id. at 619. The Court cited Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 499 (1937), a case decided only one month earlier, which held that because of "the terms of a restrictive agreement making a sale thereof impossible (i.e., a 90 day restriction on sale), (the stock) did not have a fair market value, capable of being ascertained with reasonable certainty, when they were acquired by the taxpayer." Both Propper and Helvering v. Tex-Penn Oil Co., supra, are still good law. See, e.g., MacDonald v. C.I.R., 230 F.2d 534, 539 (7th Cir. 1956), which also cited the earlier decision in Schuh Trading Co. v. C.I.R., 95 F.2d 404, 411 (7th Cir. 1938), which held "If it (the stock) was not

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\* For purposes of this argument it will be assumed that this evidence was otherwise admissible (but see Point III in which it is contended that it constituted an impermissible variance in the indictment) and that the atock was owned by appellant (but see Point I in which it was contended that he held it for the "owner of the book")

salable, there was no market for it. There was, therefore, no market value until the restriction should be removed."

The prosecutor cited two cases as standing for the proposition that the stock had a reasonably ascertainable market value, Heiner v. Gwinner, 114 F.2d 723 (3d Cir. 1940) and Chaplin v. C.I.R., 136 F.2d 298 (9th Cir. 1943).\* Chaplin is distinguishable because in that case stock that was supposedly being held in escrow was being voted by Chaplin who was also receiving the dividends thereon. Heiner held that where there was proof that prospective investors would pay some price for stock, although its delivery would be postponed, there was an ascertainable market value; Tex-Penn, Propper and Schuh were distinguished because the stock involved there was speculative whereas Continental (the stock involved in Heiner) was a stable industrial stock. In this case, by comparison, the stock was of a small textile company which the chairman said had other problems (T. 425), and, as a matter of fact, when the sale restriction was lifted the stock no longer even being traded (See Wall Street Journal of June 27, 1974 at page 19 (Am. Exchange))\*\*

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\* Neither party cited Propper or Tex-Penn Oil to the trial court, which was probably unaware of these cases.

\*\* This Court can take judicial notice of this fact for the first time on appeal. United States v. Gonzales, 442 F.2d 698, 707 (2d Cir. 1971)(opin. on rehearing). See, also, Rule 201(f) of the Federal Rules of Evidence.

Clearly, the prosecutor did not give the jury sufficient evidence to establish a fair market value.\* Since the jury focused on this stock transaction in determining appellant's guilt on the 1972 count, that conviction must be reversed.

B. THE ADMISSION OF WAX'S TESTIMONY AND THE COURT'S CHARGE TO THE JURY ON ITS USE CONSTITUTED REVERSIBLE ERROR.

Prior to agent Wax testifying, counsel objected to his testimony on the grounds that it was an unnecessary recapitulation and invasion of the jury's province; in particular they objected to the testimony of income tax due on the ground that without proof of expenses this figure could not be ascertained and, in any event this was irrelevant and would turn the case into a tax evasion prosecution. The prosecutor said that he was entitled to show the amount of tax due in order to demonstrate the "meaningful consequences" of a failure to file or a false filing. (T. 556-573)

The Court ruled that since it was irrelevant for a defendant charged with false filing to argue there were no tax consequences, so, too, the prosecutor could not adduce testimony of tax owed in re: those counts; with regard to failure to file, the Court said the testimony was irrelevant but he would let it in (T. 575-576, 605). He also ruled Wax's recapitulation proper. This was error.

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\* It must be noted that the prosecution expert himself apparently had doubts about the ascertainability of the value of the stock, since he did not use the \$22 figure Haskell set forth, but a figure of \$2 instead. (T. 602) In this connection, the refusal of the Court to admit evidence that banks had refused to even use the stock as collateral, much less to purchase it, also takes on greater significance. ( See sub-section C of this Point)

Turning first to the issue of whether the jury should have been permitted to consider Wax's testimony at all, it is contended that the answer is no.

Rather than being "someone who has expertise with figures," (T. 577) Wax turned out to be an incredibly poor interpreter, as well as compiler, of figures.

As demonstrated in Point I, Wax was in error in attributing income from a blackjack game that began in 1970 to appellant in 1969; he also grossly overstated this figure (\$10,000) by using the testimony of only one witness (Leiberman) instead of using the averaged figure (\$6,965) of Leiberman, Schwartz and Mayer; he omitted to mention testimony indicating that the only "cut" was for expenses and to pay the dealers. In testifying about the capital gain on the Flohn account, he improperly advised the jury of the purchase price in excess of \$57,000, although there was no testimony that the purchases were made in 1969 or were made with gambling proceeds, And, of course, his use of a figure of \$6,219.69 as the capital gain when his own figures showed the sum to be only \$3,209.04 (T. 594) further diminishes his "expertise."

His efforts for 1972 were even worse. He attributed one-half of David Roth's \$5000 loss to appellant as profit to the bookmaking operation; he did this despite Roth's testimony that he could not tell what portion of this loss was to the book and what part to other players in the blackjack game, directly or in the form of loans from appellant and his brother.

He arrived at a figure of \$6,965 as one-half the cut from the blackjack game by averaging the figures testified to by Leiberman, Joel Schwartz and Leon Mayer. Mayer, however, testified that he only played in this game from September or October, 1972, there was no testimony how often or how long Schwartz played in 1972, and Leiberman said he only played once or twice a month in 1972. Wax neatly disregarded this and used figures representing each witness playing the full year at the pace they played when they first entered the game (although each said he played less as the "novelty" wore off). And, of course, Wax completely omitted the testimony of Roth and Harry Mayer that there was no cut at all in this game.

Lastly, Wax attributed \$27,500 to appellant as income from the DHJ stock. Wax assumed a fair market value of \$2 and a sale price of 25%; since this would give a figure of \$2,500 ( $5000 \times 50\%$ ), Wax's calculation is incomprehensible.

While it is true that district courts have a wide discretion in admitting or excluding evidence, this "wide discretion is accompanied by a heavy responsibility on trial courts." Michaelson v. United States, 335 U.S. 469, 480 (1948). While the lower court's desire to have a person with "expertise in figures" provide the jury with a summary of the testimony may have been a proper exercise of discretion, by the time Wax finished and demonstrated his incompetence the trial Judge had a clear duty to remedy the situation by directing the jury not to consider that testimony at all. Schaffer v. United

States, 362 U.S. 511, 516 (1960) (Trial Judge had "continuing duty" at all stages of trial to prevent prejudice); United States v. Kelly, 349 F.2d 720, 759 (2d Cir. 1965).\*

In United States v. Celetano, 391 F. Supp. 1252 (D.C., S.D.N.Y. 1975), Judge Duffy ruled that where an IRS expert, called by the prosecution to explain how the defendant's tax liability was arrived at, produced calculations which "as a matter of fact and of law.... were wrong," guilt beyond a reasonable doubt had not been established. The lower court here should, at the least, have refused to permit the jury to consider the similarly defective testimony of agent Wax.

Assuming, without conceding, that Wax's testimony was admissible as a summary of other witnesses' testimony, it was wholly improper and prejudicial for him to testify to the amount of income tax owed by appellant.

The trial court properly ruled that since the absence of any tax consequences is not a defense to a false filing charge, the prosecutor could not introduce evidence of income tax due on those counts. Although the court originally ruled that such testimony was necessary on the failure to file counts, he subsequently ruled that

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\* The court's boiler-plate statement that the jury was not "bound" by Wax's testimony does not cure this error since they should have been told not to consider the testimony at all. In any event, since the jury specifically requested and heard Wax's testimony about appellant's income in 1969 (T. 1150-1153) and in 1972 (T. 1154-1156) it is obvious that the jury was relying on that testimony despite any instructions from the court.

such testimony was not necessary but that he would permit it anyway.  
(T. 605)\*

That an amount of income tax was owed by a defendant is relevant to a charge of tax evasion (United States v. Coppola, 425 F.2d 660, 661 (2d Cir. 1969)) but is irrelevant to a charge of failure to file. As the jury was charged, even if a defendant could demonstrate that he had expenses or deductions larger than an amount of income, so that he was entitled to a refund, he would still be guilty of violating Sections 7203 if he received sufficient income so that he was required to make a return. Accordingly, the amount of tax owed, if any, was irrelevant.

Not only was Wax's testimony about income tax due therefore irrelevant, but its admission was prejudicial. In legal contemplation, it varied the indictment and turned the charges into the more serious ones of tax evasion. (See Point III) More to the point here, it permitted the jury to infer from proof of a tax being due to the fact of a wilful failure to file. This inference was impermissible, and doubly so because Wax's erroneous figures greatly inflated the figures he said were owed.\*\*

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\* The court told the jury that proof of tax owed was irrelevant to the failure to file counts (T. 1094) which charge could only have confused them since the prosecutor had fought so hard to get this proof before them. (T. 607-610)

\*\* Even if the tax owed was relevant, the use of these greatly enlarged figures would itself constitute reversible error, i.e., if the amount of tax owed was a "meaningful consequence" of a (footnote continued on following page)

United States v. Robinson, \_\_\_\_\_ F.2d \_\_\_\_\_, slip. op. 5913  
(2d Cir. dec'd 11-1-76).

C. THE EXCLUSION OF THE APPLEMAN TESTIMONY

Because of the indefiniteness of the testimony as to the cut from the blackjack game, as well as the testimony indicating that someone other than appellant owned the game and the book, the testimony as to the taxability of the DHJ stock took on greater significance. It was the only objective proof, at least on its face, that appellant had received something that might have constituted income in 1972. In addition to contending that, as matter of law, the stock was not taxable income in 1972 (see Point II(a)), counsel also sought to show that even if this was taxable income appellant did not believe it was and his failure to file any return with regard to it was not wilful.

To this end, defense counsel offered to put on the stand a tax expert, one Murray Appleman,\* to testify that appellant came to him because of his inability to sell the stock or use it as collateral, and that Appleman gave appellant a letter stating his (Appleman's) belief that the stock was not taxable income\*\*. At first

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\*\* failure to file, then it was absolutely essential that the jury have the correct figure, for the lower the tax owed the less meaningful the failure to file.

\* Mr. Appleman was the attorney in the Celetano case, supra.

\*\* This letter is set forth, in full, in the Appendix.

the court ruled the testimony proper because it showed appellant's state of mind and was relevant to the issue of wilfulness. However, when the court later saw that the letter was dated in 1974 he reversed his position and excluded the testimony as "self-serving;" counsel argued that that went to the weight the jury could give the testimony, not its admissibility, but the court refused to admit it. (T. 725-730, 810-816) This was error.

The importance of Mr. Appleman's testimony cannot be overstated. It would, if believed, establish that because of the refusal of banks to accept the stock as collateral, and the refusal of anyone else to purchase it, appellant could well have believed the stock was worthless or, at least, did not constitute income in 1972. The fact that appellant attempted to dispose of the stock "immediately" upon its acquisition in 1972 defeats the courts objection that appellant's recourse to Appleman was a belated "self-serving" act. Accordingly, Appleman should have been permitted to testify, and the letter should have been admitted, to show appellant's state of mind in 1972. Fed. Rules of Evidence, Rule 803(3).

The later consultation of Appleman was also relevant in the sense that it made more probable the fact that the consultation might be viewed as self-serving was not a bar to admissibility but went only to the weight the jury might or might not assign to it. United States v. Dawson, 400 F.2d 194, 199 (2d Cir. 1968); Allied Amer. Mut. Fire Ins. Co. v. Paige, 143 A2d 508, 510 (D.C. Ct. of

Appeals, 1958). Cf. United States v. Matot, 146 F.2d 197, 199 (2d Cir. 1944).

And, of course, Appleman's belief that the stock was not taxable income in 1972 might have convinced the court to exclude it from the jury's consideration or, at the least, have influenced the jury's consideration of this matter.\*

In United States v. Platt, 435 F.2d 789 (2d Cir. 1970) this court reversed a failure to file conviction because of the refusal of the trial judge to made reference to the appellant's asserted reliance on his accountant's practice of securing extensions. The refusal to include such a reference in the charge was held to have deprived the appellant of his constitutional right to present a defense of lack of wilfulness. Df. Chambers v. Mississippi, 410 U.S. 284 (1972). The refusal of the trial court to admit evidence that the appellant had regularly filed withholding tax returns during the period of the indictment was also error, "(b)earing in mind Judge Learned Hand's wise counsel in United States v. Matot, 146 F.2d 197 (2d Cir. 1944), concerning the latitude that should be

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\* It must be remembered that the jury specifically asked if the DHJ stocks were to be considered taxable income and the Court said they were to decide that based on the evidence of Haskell. Counsel specifically objected to this charge because the jury had not been allowed to hear Appleman's testimony. (T. 1142-1148)

accorded a defendant with respect to evidence tending to negate criminal intent." Id. at 791.\*

The same is true here. While the jury was told that the restrictions on the stock could be considered on the issue of taxability they did not have the benefit of Appleman's testimony that those restrictions rendered the stock non-taxable. Perhaps of greater importance, the jury was denied the right to consider appellant's inability to dispose of the stocks and his consulting of Appleman on the critical issue of wilfulness, i.e., did he believe the stocks were taxable income?

As Judge Learned hand said in United States v. Matot, supra:

"The exclusion of evidence....merely because of its logical remoteness from the issue, is always a hazard, and is usually undesirable. It is always hard to say what reasonable people may deem logically material, and all doubts should be resolved in favor of its admission...While in a clearer case we might disregard the error, it seems to us, so doubtful are we of the accused's guilt, that Matot should have been allowed whatever advantage the testimony might have given him."

- \* The Court said that the exclusion of these returns would not have constituted reversible error because the fact of their filing had been adduced from another witness. Id. at n.7. In this case, by adverse comparison, not only was the Appleman letter excluded but the witness himself was also prevented from testifying.

POINT III

THERE WAS A FATAL VARIANCE BETWEEN  
THE INDICTMENT AND THE PROOF: FURTHER  
THE PROSECUTOR AND THE COURT IMPROPERLY  
AMENDED THE INDICTMENT.

Indictment 75 CR 736, insofar as relevant, charged that appellant "operated a gambling business" and failed to repair "the gross wagers received, the expenses incurred, or any other information relative to this business." The theory of this prosecution was that appellant and his brother owned equal shares in a bookmaking operation and a blackjack game and that each failed to repair income from this partnership. (T. 12-13) During the presentation of the prosecution's case, however, the evidence began to erode this theory as the government's own witnesses portrayed appellant as a degenerate gambler and loser and some other person as the operator of the gambling enterprise. (T. 161, 426) In addition, and based on the language in the indictment, counsel sought to develop the defense that appellant and his brother were not the owners of this gambling operation but were "in the category of a worker or runner or something like that..." This was accomplished by cross-examining prosecution witnesses to bring out this distinction. (T. 343, 353)

After the prosecution had rested, counsel moved to dismiss on the ground that appellant and his brother had been shown to be, at most, only occasional workers for Balsamo. When the Court ruled

that any compensation they had received could be considered income counsel objected that this constituted a variance in the indictment; furthermore, he specifically stated that he would not have brought out this information (but would have been content to rest with negating the claim of operator) if he had known the use to which this testimony would be put. The Court overruled the objection (T. 679-682, 720-724).\*

In summation, the prosecutor was permitted to tell the jury that even if they believed the defense theory they could convict appellant for failing to report tips, salary, or any other money he earned. (T. 996, 1004-1005)

In an effort to offset this, defense counsel jointly requested that the Court tell the jury that it could not consider these sums but could only convict if it found income as charged in the indictment ("wagers" not "wages"). The Court refused to so charge and exception was duly noted. (T. 948-954, 1123, 1128)\*\*

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\* More evidence that appellant occasionally was paid for helping Balsamo was brought out on the defense case. This cannot, however, be construed as a waiver of this objection. Faced with the Court's ruling counsel had to develop his case as best he could and hope to convince the judge to change his mind (further objection to the use of this testimony was made during pre-charge colloquy (T. 948-954)). Failing that, counsel had to hope the jury would acquit despite the Court's instructions. And, as a last resort, the error was preserved for appeal.

\*\* Although the Court specifically told the jury that the Plohn account testimony did not represent gambling income the Court also told the jury it could be considered as income in 1969 (footnote continued on the following page)

Whether considered a variance or a constructive amendment (United States v. Pelose, 538 F.2d 41, 45 N.8 (2d Cir. 1976)) the net effect of the foregoing was to convict appellant of a crime not charged in the indictment.

In United States v. Pelose, supra, this Court refused to hold an amendment to be prejudicial because:

"(T)here is nothing whatsoever in the record which suggests that appellant was in fact taken by surprise and deprived of an opportunity to prepare a defense as a result of the Court's charge on wilfulness." Id. at 45.

Here, by contrast, counsel was taken completely by surprise by the Court's ruling that evidence which was not within the scope of the indictment, and which was adduced for the purpose of preparing a defense, would be used as evidence of guilt. Cf. United States v. Platt, 435 F.2d 789, 793 (2d Cir. 1970)(reversible error committed "in converting a defense shield, however fragile, into a prosecution sword"). See, also United States v. San Juan, \_\_\_\_\_ F.2d \_\_\_\_\_, slip 471, 481-484 (2d Cir. 11-10-76)(change in the prosecutor's theory was held to have deprived the appellant of due process).

In United States v. D'Anna, 450 F.2d 1201 (2d Cir. 1971) this Court rejected a claim of prejudicial variance and surprise because "The bill of particulars in the instant case clearly indicated the proof that the Government would rely upon in the prosecution." Id.

\*\*contd.- within the meaning of the indictment. (T. 1105) This, too, was error and everything said, infra applies with equal force to this.

at 1204. Here, the bill of particulars indicated proof of large sums of unreported income and the Court's permission to change that violated appellant's right to a fair trial. Cf. United States v. Murry, 297 F.2d 812, 819 (2d Cir. 1962); United States v. Neff, 212 F.2d 297, 309 (3d Cir. 1954).

In the landmark case of Ex parte Bain, 121 U.S. 1 (1886) the Supreme Court held that it was improper for a Trial Court to change the language of an indictment because that violated a defendant's Fifth Amendment right to be tried only for the crime upon which the grand jury indicted. Id. at 9-10.

Such an improper change occurs either when the Court explicitly changes the language in the indictment (see, e.g., Dodge v. United States, 258 F.2d 300 (2d Cir. 1919)) or as here, constructively does the same by permitting evidence outside the indictment and then permitting the jury to convict thereon. See, e.g., United States v. Goldstein, 502 F.2d 526 (3d Cir. 1974)(indictment charged wilful failure to file on April 15; jury told it could consider wilfulness up to three weeks later because proof showed defendant had been granted an extension; held to be fatal variance); Poonian v. United States, 294 F.2d 74 (9th Cir. 1961)(indictment charged defendant with failing to report "his" income; jury told it could consider failure to report his mother's income; held to be fatal variance).

Stirone v. United States, 361 U.S. 212 (1960) involved a sit-

uation similar to that here. Stirone was charged with unlawfully interfering with interstate commerce in that, by extortion, he obstructed the movement of material for concrete into and out of Pennsylvania. In addition to proof of the foregoing, the trial court permitted the prosecutor to introduce, and the jury to consider, evidence of the obstruction of the movement of steel into Kentucky and Michigan. The Supreme Court reversed with the observation that the grand jury had indicted for one interference with interstate commerce and there was no way of knowing if they would have indicted for the other one the judge permitted the jury to consider. Id. at 217-219.

It is true that the lower court did not explicitly charge the jury that it could consider as income tips or other monies appellant earned as a worker. It did, however, permit the prosecutor to say precisely that (and its boiler-plate charge that the jury could disregard the prosecutor's recollection of the evidence does not remedy this). Furthermore, it did tell the jury it could consider any income from the gambling operation on the issue of materiality. (T. 1101) And it turned down an express request that the jury be told the tips, etc. could not be considered income. (T. 1123)

The court had earlier refused the same request on the ground that if the jury found a partnership that would be the equivalent of a finding that the defendants had been operators as charged in the indictment. (T. 956, 1124) That is probably true - but the jury

did not find a partnership; this means, under the court's own reasoning, that they may have found appellant was not an operator but convicted him as a worker.

To paraphrase the Court in Stirone:

"The grand jury which found this indictment was satisfied to charge that appellant failed to report income from a gambling operation he owned.\* But neither this nor any other Court can know that the grand jury would have been willing to charge that appellant failed to report occasional tips or other monies he received as a worker in that operation. And it cannot be said with certainty that with a new basis for conviction added, appellant was convicted solely on the charge made in the indictment and grand jury returned. Although the Trial Court did not permit a formal amendment of the indictment, the effect of what it did here was the same."

There must be a reversal and a new trial.

#### POINT IV

THE JOINDER OF APPELLANT AND HIS BROTHER IN THIS INDICTMENT WAS IMPROPER BECAUSE THE CONSPIRACY COUNT WAS NOT BROUGHT IN GOOD FAITH: IN ANY EVENT, THERE SHOULD HAVE BEEN A SEVERANCE BECAUSE OF THE POTENTIAL AND ACTUAL PREJUDICE TO APPELLANT'S RIGHT TO AN INDIVIDUAL DETERMINATION OF GUILT.

Indictment 75 CR 736 charged appellant and his brother jointly with conspiracy to violate the income tax laws (count 1) and with several individual substantive violations. (Counts 2-4 charged

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\* At counsel's request the Grand Jury minutes were sealed for presentation to this Court. (T. 954-955) The attention of this Court is directed to those minutes to see if any reference to other forms of compensation is present.

Anthony with false filing in 1969, 1970 and 1971; counts 5, 6 and 8 charged appellant with failure to file in 1969, 1970 and 1972; and count 7 charged appellant with false filing in 1971.)

Prior to trial, appellant's counsel moved for a severance based on improper joinder under Rules 8(b) and 14 of the Federal Rules of Criminal Procedure.\* Counsel contended "that there is no basis for joinder as (to) the separate (substantive) counts (because they) pertain to the individual responsibility and obligations of the defendants as individuals...(and t)he conspiracy, as alleged, has no factual basis". (Motion dated December 12th, 1975 at 8.) In this same Motion, counsel had requested that the Trial Court inspect the Grand Jury minutes and dismiss the conspiracy count:

"...on the ground that there is not the slightest scintills of evidence that these defendants violated Section 371... (and 1)t is submitted that the 371 violation was pleaded in this Indictment as a mere subterfuge to allow these two defendants to be tried together." Id. at 7\*\*

In a decision dated February 23rd, 1976, (set forth in full in the Appendix), the Motion for severance was denied on the ground

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\* This Court has noted that a claim of improper joinder and a request for severance are "corollary" claims. United States v. Blitz, 533 F.2d 1329, 1343 N. 43 (2nd Cir., 1976).

\*\* Counsel re-iterated this position throughout the trial.

that "the conspiracy count, having been charged by the Grand Jury, is deemed sufficient" and "it is unlikely that...the proof as to both defendants will vary in any material way...(so) this is not a situation where a danger exists that the guilt of one defendant will spill over to the other". (Id at pp 7, 8)

This was error.

A. IMPROPER JOINDER:

Simply stated, it is appellant's position that there never was any proper legal basis for the bringing of the conspiracy count and that its inclusion in the Indictment represented a bad faith effort on the part of the prosecution to assert a basis for joinder.

Although counsel has not, of course, seen the totality of the Grand Jury minutes which resulted in this Indictment, counsel feels safe in contending that they contain not a scintille of evidence that appellant and his brother conspired to violate the income tax laws.\*

Not a single prosecution witness (some or all of whom presumably appeared before the Grand Jury) set forth an iota of direct or circumstantial evidence from which such a conspiracy could even

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\* As noted in connection with Point III, the Grand Jury minutes were sealed for review by this Court (T 954-955) and we invite the court's attention to them in this connection.

be assumed, much less proven. Appellant was portrayed as an habitual gambler always "looking for a game" whereas his brother, when he appeared at any of the games, merely looked on and chatted; appellant rarely, if ever, took a bet through the "Wilson" book-making office; whereas Anthony was deeply involved in this operation. Although this might barely have justified a charge of a conspiracy to violate gambling laws, it provides no support for a charge of conspiracy to violate the income tax laws.\*

Each of the accountants called by the Government testified that he prepared tax returns for a different brother (T. 76-77, 98), that neither brother said anything about the other, and that the brothers never participated in any joint discussions of income tax matters. (T. 96- 97, 104).

Furthermore, there was absolutely no pattern from which a con-

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\* Counsel pointed out this difference in his pre-trial Motions (Motion of December 15th, 1975 at 7) and throughout the trial

As counsel stated in his Motion:

"The responsibility to file income tax returns or, for the matter, to file accurate returns is, absent the existence of a corporate or other business entity, an individual responsibility. There is no doubt that in theory, two or more persons can conspire to violate these sections. However, in the instant case, the Government apparently confuses an alleged agreement to violate the gambling laws with the conspiracy pleaded, i.e.: an agreement to violate the tax statutes. In other words, if two individuals agreed to commit a robbery and then each failed to report the proceeds of that robbery on his income tax return, the agreement or conspiracy to rob would not carry over, absent specific proof on this subject, to an agreement to evade the payment of taxes."

spiracy could be inferred: Appellant did not file in 1969, 1970 and 1972 while his brother did, but they both filed in 1971; although both knew they were being investigated by 1973 appellant filed no return whereas his brother reported \$180,000 in "Sullivan case", i.e., gambling, income.

Even the trial court rejected the prosecutor's ludicrous argument that appellant's non-filing in 1972 and his brother's reporting of \$180,000 showed the existence of an agreement; if anything, the court agreed, it cut against such a conclusion, particularly when taken into account with the prosecutor's previous argument that the fact that both filed in 1971 demonstrated the existence of a common plan. (T. 682-687, 730-734)\*

Lastly, of course, the jury's acquittal on the conspiracy count demonstrates the complete absence of any basis for its ever having been brought.

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\* Defense counsel accurately described the flip-flopping of the prosecutor as follows:

"I'll make one observation and this is the last I'll say with respect to this issue I have to say it.

"The talk of the facts showing a pattern suggesting that the two get together and, therefore, supporting the conspiracy claim, the closest example I can come to that kind of logic is if you recall that the jack of hearts was being tried and the king said it was definitely the jack of hearts that did it because that's his signature clear as can be. When it was pointed out it was not his signature, (the king then said that he is) even more guilty because he must have disguised it because we have con-  
(footnote continued on following page)

In United States v. Ong, 541 F.2d 331, 337 (2nd Cir., 1976) this court re-iterated that joinder is improper (and reversal and severance the remedy) where the court upon which the joinder was allegedly justified was brought in bad faith, i.e., without "reasonable expectation that sufficient proof will be forthcoming at trial\* This is precisely what happened here.

Although it is true that the prosecutor might not have known exactly what his witnesses would say, the total absence of any testimony from which an income tax conspiracy could even be postulated permits an inference that the prosecutor knew (or, at the least, should have known) that there was no such proof.\*\* It is

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\*contd - sciousness of guilt. We're talking about conspiring a pattern and a consistent non-pattern. I have to unburden myself of that." (T.734)

\* Although Ong involved a dismissal at the close of the Government's case, the rule is the same where the jury acquits. United States v. Schaffer, 266 F.2d 435, 441 (2nd Cir., 1959), aff'd 362 U.S. 511 (1960)

\*\* It is perfectly proper to look at the proof actually adduced in determining the prosecutor's good or bad faith at an earlier time. See, e.g., United States v. Blitz, 533 F.2d 1329, 1344 (2d Cir., 1976).

interesting to note that under Rule 14 the Judge can require that the prosecutor make some factual showing in response to a motion for relief from prejudicial joinder. The only thing the prosecutor asserted here was that the pattern of fillings permitted an inference of conspiracy. Suffice it to say that there was no such pattern and in the absence of any other proof the joinder was improper. There must be a reversal and a new trial.\*

B. PREJUDICIAL SPILLOVER.

It is appellant's position that no prejudice beyond the improper joinder need be shown. As the Court said in *United States v. Donaway*, 447 F.2d 940, 943 (9th Cir., 1971):

"If the offenses are in no way connected and several defendants are tried together, they are prejudiced by that very fact. Metheany v. United States, 365 F. 2d 90, 95 (9th Cir., 1966)"

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\* It is respectfully suggested that this Court should also rule that where a motion for severance based on bad faith joinder establishes some prima facie minimum showing, as here, the prosecutor is required, in camera, or in open court, to make some minimum factual showing of good faith. Cf Rule 14.

It is also suggested that to the extent the lower court's failure to require such a showing has left the record unclear on this subject, the appeal should be remanded for a hearing on the matter.

If prejudice needs to be shown, however, it exists in abundance. Aside from the fact that he was being tried with his brother, which made the assumption of guilty conduct by his co-defendant more easily inferable to appellant, the following specific pieces of evidence about that conduct were put before the same jury which was to decide appellant's guilt:\* all of the testimony about the brother's deep involvement in the "Wilson" bookmaking office (taking bets, discussing accounts, making pay-offs and collections), which far exceeded appellant's occasional involvement; the testimony that the brother leased the apartment where the 1972 blackjack game was played; the testimony that the brother hired some persons for this game and gave most of the orders; the testimony that the brother declared \$180,000 in Sullivan case (gambling) income in 1972\*\*; and the testimony that in 1974 the brother filed papers stating that the DHJ stock was not a gift but was in "settlement of a debt", i.e., a gambling debt.

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\* Needless to say, none of this would be admissible at a separate trial (or re-trial) of appellant.

\*\* The prosecutor referred to this as "mysterious" income. (T. 1003).

The particular vice of the evidence about the brother's activities in 1972 is that since there was no substantive charge against the brother for that year, this evidence came in solely against appellant! For example, when appellant's counsel asked the Judge to instruct the jury that testimony of John Haskell about his dealings with Anthony in 1972 were not admitted against appellant, the Judge gave precisely the opposite instruction because there was no substantive charge against Anthony in 1972. (T. 371)\*

It is true that the court attempted to limit the introduction of evidence to the person being testified about, but there is a serious question as to whether that was successful. As the court itself noted, the constant repetition of the instruction itself seemed to deprive it of any meaning or force, and the jury began to laugh when the court recited the ritual phrases. (T. 444) In addition, defense counsel contended that the jury could not follow these instructions and that the very fact of repetition increased the prejudice. (T. 444-445) And, of course, with regard to the

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\* Assuming the conspiracy count was proper the court could have admitted all of the evidence against both defendants "subject to connection". The fact that, instead, he admitted much of the evidence only against the person being testified about does not cure the error of admitting testimony about Anthony only against appellant.

events of 1972, the jury was incorrectly told to limit that evidence to appellant.

When the Motion for severance was initially made, Judge Neaher specifically noted his awareness of his "continuing duty at all stages of the trial to grant a severance if prejudice does appear... (and to) be particularly sensitive to the possibility of that prejudice". Schaffer v. United States, 362 U.S. 511, 516 (1960). The trial was held, however, before a different Judge (recently appointed Judge Pratt) "to whom the dangers of joinder (and prejudice) might not have been apparent." United States v. Donaway, supra, 477 F.2d at 943.

In sum, the instructions given were insufficient to prevent the kind of spill-over prejudice which deprives a defendant of the right to an individual determination of guilt. Bruton v. United States, 391 U.S. 123 (1968); United States v. Donaway, supra.

Appellant is entitled to a new trial.

## POINT V

THE CONVICTION OF APPELLANT FOR FAILING TO FILE INCOME TAX RETURNS IN 1969 AND 1972 IS REPUGNANT TO HIS ACQUITTAL ON THE CONSPIRACY CHARGE, THE FALSE FILING CHARGE FOR 1971 AND THE FAILURE TO FILE CHARGE IN 1970; ACCORDINGLY, THE CONVICTION MUST BE SET ASIDE.

For all intents and purposes, the prosecution's proof and appellant's defense were the same for all of the years involved in this indictment. The government alleged that appellant owned and profited from a bookmaking and blackjack operations and appellant countered that the operation belonged to someone else and he received no income therefrom. Despite these similarities in proof and defense, the jury convicted appellant only for 1969 and 1972 and acquitted for 1970 and 1971. This constitutes reversible error.

It is recognized that the general rule is that "Consistency in the verdict is not necessary." Dunn v. United States, 284 U.S. 390, 393 (1932); United States v. Coplon, 185 F.2d 629 (2d Cir. 1950); United States v. Pettl, 168 F.2d 221 (2d Cir. 1948). However, it is our contention that (a) this case constitutes as exception to the general rule or (b) that that rule must be re-examined to see if it is still valid.

### A. EXCEPTION TO DUNN RULE.

Dunn is not applicable where the acquittal negatives a fact which is necessary for the conviction, for that results in repugnant verdicts, Dunn v. United States, supra, 284 US at 406-407 (dissent);

United States v. Travers, 335 F.2d 698, 702 (D.C. Cir. 1964).

The acquittal of appellant on the conspiracy charge would not, therefore, be repugnant to his conviction on the failure to file charges; since the jury also acquitted appellant's brother of all charges it may well have believed the latter had nothing to do with the gambling operation, and since only he and appellant were charged in the conspiracy, his acquittal (as the judge properly charged the jury (T. 1112,1115)) required appellant's acquittal on that charge. See, e.g., United States v. Rubinson, 543 F.2d 951, 960 (2d Cir. 1976).

Appellant's acquittals on the failure to file in 1970 and the false filing in 1971, however, do negative a fact necessary for conviction on the other two failure to file charges: to wit, either that appellant received income or that he wilfully failed to file, or falsely filed, a return.\* Accordingly, the connections must be set aside.

This is not a case where the jury failed to reach a verdict on one charge and convicted on a related charge. That is the sort of

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\* Although the elements of false filing under 26 U.S.C. Section 7201 and failure to file under 26 U.S.C. Section 7203 are not precisely the same, they are the equivalent of each other with regard to this issue and with regard to the facts of this case, i.e., did appellant receive income which he wilfully failed to file or which he wilfully omitted from a return. Cf. Ashe v. Swenson, 397 U.S. 436, 444 (1970). To paraphrase United States v. Jacobson, \_\_\_ F.2d \_\_\_, slip op. 1021, 1024 (2d Cir. dec'd 12/17/76), "(T)he Court should not strain to dream up hypertechnical and unrealistic grounds on which the acquittals might have rested..."

inconsistency which has been permitted. Hamling v. United States, 418 U.S. 87, 100-101 (1974). This is rather, an affirmative contradiction or repugnancy and it may not stand. See, e.g., People v. Carbonell, \_\_\_\_\_ NY 2d \_\_\_\_\_, (dec'd. 11/22/76).

Furthermore, the Dunn rule has traditionally been applied to prevent a defendant from obtaining a double benefit where he was not entitled to a single one, i.e., to prevent reversal on a conviction which was justified because of an acquittal which was not. See, e.g., Lambert v. United States, 101 F.2d 960, 963 (5th Cir. 1939). Here we maintain that it was the acquittal which properly reflected the proof and the conviction which was in error. (See Point I) Therefore, it would be quite proper to set aside conviction so that the total verdict would represent the evidence in the case.

B. REEXAMINATION OF DUNN RULE.

Firstly, it should be noted that the strength of the precedential underpinning of Dunn itself may be subject to some doubt. To support the proposition that "Consistency in the verdict is not necessary" the majority cited two cases - Latham v. The Queen and Selvester v. United States. However, as the dissent points out, an affirmative inconsistency in verdicts "is not a (mere) failure of the jury to pass on all the counts submitted to them as in Selvester... and Latham...", cited in the opinion here. In this case the jury responded to all the issues, but the findings cannot be reconciled" Dunn v. United States, 284 U.S. 390, 399 (1932)(dissent).

See, also, Hamling v. United States, supra, People v. Carbonell, supra.

Secondly, the reasons behind the Dunn rule are no longer valid.

In United States v. Maybury, 274 F.2d 899 (2d Cir. 1960) this court carved out an exception to the Dunn rule where the case was tried to a Judge. The Court said that Dunn was based on "special considerations relating to the nature and function of the jury." Id. at 902.

The Court acknowledged that the jury, having developed as an alternation not to trial by the Court but to trial by ordeal, was, historically, not required to be any more "rational" than the procedure it replaced. It is:

"but slowly that the jury was rationalized and regarded as a judicial body." Id. at 903.

In other words, the rationalization of the jury has been an on-going process and Dunn merely shows that "it has not yet been deemed wise that this process of rationalization should be carried to the point of requiring consistency in a jury's verdict in a criminal case" Ibid.

We submit that time has come. In recent years, the increasing concern with the rights of criminal defendants has led the Supreme Court to take a closer look at the jury decision process and to try to remove some of the irrational aspects thereof. See, e.g., Bruton v. United States, 391 U.S. 123, 126-129 (1968). Removing the "right" to return repugnant jury verdicts would go far toward giving defend-

ants a much-needed protection.\*

Maybury, supra, suggested another reason for retention of the Dunn rule which might mitigate against the above argument, and that is the requirement of jury unanimity. Maybury, supra, 274 F.2d at 903:

"Ignoring inconsistency in a jury's disposition of the counts of a criminal indictment may thus be deemed a price for securing the unanimous verdict (of the jury as representing the community) that the Sixth Amendment requires..."Ibid.

With regard to this, it should be noted that, at least in state trials, unanimity is not considered part of the Fourteenth Amendment. Johnson v. Louisiana, 406 U.S. 356, (1972). Therefore, while the federal courts may still require unanimity the reasons therefore no longer require ignoring repugnancies in verdicts.

Finally, it has been suggested that Dunn has been eroded by the Supreme Court's decision in Ashe v. Swenson, 397 U.S. 436 (1970) where it was held that one acquitted of the robbery of one of six

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\* Income tax prosecutions seem particularly susceptible to repugnancies in verdicts. See, e.g., United States v. Williams, 470 F.2d 915 (2d Cir. 1972); United States v. Platt, 435 F.2d 789 (2d Cir. 1970); United States v. Grossman, 468 F.2d 632 (2d Cir. 1972); see also, United States v. Lattus, 512 F.2d 352 (6th Cir. 1975).

men at a card game at one trial could not be tried for the robbery of another at a second trial. See, e.g., United States v. Fox, 433 F.2d 1235, 1239 (D.C. Cir. 1970).\*

We urge this Court to re-examine Dunn in the light of Ashe and the foregoing and to declare that it is no longer valid or, atleast, is inapplicable to the facts of this case. Cf. United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

A rule against repugnant verdicts at a single trial is as much required by the due process clause of the Fifth Amendment as a rule of collateral estoppel in multiple trials. Appellant's convictions must be set aside and the indictment dismissed.

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\* It is submitted that this Court's decision in United States v. Robinson, supra, also has recognized the change in the law suggested by Ashe for, instead of merely citing Dunn in response to a claim of repugnancy, the Court took great pain to show that the jury's verdict was, in fact, legally and factually consistent. 543 F.2d at 960.

CONCLUSION

For the above-stated reasons, the judgment of conviction appealed from must be set aside and the indictment dismissed; in the alternative there must be a new trial.

Respectfully submitted,

James M. La Rossa  
Attorney for the Appellant  
Andrew Garguilo

Joel A. Brenner,  
Of Counsel

Service of three 0 copies of the within  
is admitted this 14<sup>th</sup> day of February 1977

U.S. Atty for the Eastern District  
attorney for Appellee

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